IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 17, 2008 Session

WILLIAM C. BROOKS v. WILLIAM G. JOHNSON, ET AL.

Appeal from the Chancery Court for Knox County
No. 169098-2 Daryl R. Fansler, Chancellor

No. E2007-02840-COA-R3-CV - FILED JULY 30, 2008

William C. Brooks ("Plaintiff") sued William G. Johnson and Zenniel Johnson ("Defendants") seeking to establish that Plaintiff had acquired title to certain real property located in Knox County, Tennessee by adverse possession. Defendants answered Plaintiff's petition and counter-claimed to quiet title to the disputed land. After a trial, the Trial Court entered an ordering finding and holding, *inter alia*, that Plaintiff did not prove adverse possession by clear and convincing evidence, and that the boundary line between Plaintiff's and Defendants' properties was as shown on a survey prepared by Joseph R. Overton in 1972. Plaintiff appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Willis B. Jackson, Jr., Knoxville, Tennessee for the Appellant, William C. Brooks.

David T. Black, Maryville, Tennessee for the Appellees, William G. Johnson and Zenniel Johnson.

OPINION

Background

Plaintiff lives at 2619 Stubbs Bluff Road in Knoxville, Tennessee. Plaintiff purchased his property from his mother in 1977, and his deed states that Plaintiff owns 8.7 acres. Defendants live at 2739 Stubbs Bluff Road in Knoxville, Tennessee. Defendants purchased their property in 1972, and their deed shows that they own 100.51 acres. At some point in 2005, a dispute arose between Plaintiff and Defendants regarding the boundary between their respective properties. Plaintiff sued to establish adverse possession to the disputed land, and Defendants counter-sued to quiet title.

At trial, Plaintiff testified that the conflict between his deed and Defendants' deed is that Defendants' deed contains a call that cuts across Plaintiff's garden. Plaintiff explained that the disputed portion of land is "[u]p here at the front it's a few inches, but as it goes on back there it's about 25 or 30 feet, when you get all the way back to the back of the property."

A surveyors' pin that supports Defendants' deed description lies on property that Plaintiff claims belongs to him. Plaintiff admitted that this pin was there when he purchased his property in 1977, and stated "but it's on my property, that pin has been there." Plaintiff testified that as far as he knows this pin was placed by Mr. Overton who surveyed the property in 1972, approximately five years before Plaintiff purchased the property from his mother. Plaintiff disputed that this pin shows the true boundary line and further claimed that there was another iron pin and a metal fence post that marked his property line. Plaintiff explained that this other pin was placed "[p]robably in '43 when it was surveyed the first time." James F. Cross, II, a licensed land surveyor, prepared a survey for Defendants in 2005 after the dispute with Plaintiff arose. Mr. Cross testified that he was unable to find the pin that Plaintiff claims marks the true boundary when he performed his survey.

Plaintiff testified that he has used a portion of the disputed property as a garden and has done so for thirty years. Plaintiff testified that over the years, he has planted "[b]eans, okra, tomatoes, corn, watermelon, cantaloupes, except for the past few years, after I got older and I've not been doing as much. I've only got tomatoes and cantaloupes and cucumbers in there now." Plaintiff stated he used "every bit" of the property above his driveway as a garden during the entire time he has owned the property.

Behind Plaintiff's garden is a wooded area and beyond that area is a lawn that Plaintiff testified he mows. When Plaintiff purchased his property in 1977, the lawn area was woodland. Plaintiff cleared the woodland, hauled the brush into the woods, and burned the wood in his wood stove. Plaintiff testified that there are some trails through the remaining wooded area and that he has used these trails to haul brush with his tractor. Plaintiff testified that he "told anybody that wanted to they could go down there and hunt."

Plaintiff testified that a line of trees exists that he believes marks his property line. These trees were not there when Plaintiff first acquired his property, but rather were put in later by Defendants. Defendant, Mr. Johnson, testified that "[t]he tree line don't have anything to do with the property line."

Plaintiff testified that Defendants never objected to his garden, to his clearing the land behind the garden, to his putting brush down in the wooded area, or to his creating the trails. Plaintiff testified that he has always been taxed for 8.7 acres and that he has always paid property tax on 8.7 acres.

Plaintiff testified that he first became aware of a dispute regarding the property line "about a year ago" when Mr. Johnson "came up through my woods and I was standing out by the house. He wanted to know where the line was, back stake. We went back there and I showed it to him.… He didn't say nothing." Plaintiff admitted that Mr. Johnson did complain about four-wheelers on his property.

Mr. Cross, who performed the survey for Defendants in 2005, testified that the description in Plaintiff's deed is "not in harmony with any of the surrounding properties." Mr. Cross read Plaintiff's parents' deed, which was for twenty-four and a half acres, and interpreted it to determine that the property description contained in that deed does not encompass land anywhere near Defendants' property. Rather, Mr. Cross testified, the description contained in Plaintiff's parents' deed is for land approximately 2,000 feet away from the line with Defendants' property.

Defendant, Mr. Johnson, testified that he and his wife live approximately 2,000 feet away from Plaintiff. Defendants purchased their property in 1972, approximately five years before Plaintiff purchased his property. Mr. Johnson testified that he has paid taxes on his property ever since he purchased it. Defendants did convey a portion of their property to their daughter five or six years before trial and also granted the State a twenty-five foot right-of-way from Stubbs Bluff Road.

Mr. Johnson testified that he and his wife had their property surveyed by Mr. Overton when they purchased it in 1972. Mr. Johnson testified that at time of trial Mr. Overton resided in a nursing home in Clinton. Mr. Johnson testified that when Mr. Overton performed the survey, "he came to me and told me about this survey being off. And he said he run it out and he couldn't find any end to it. So he told me he was going to [Plaintiff's mother] and ask her what - - let her help with pin pointing everything." Mr. Johnson witnessed Mr. Overton having a conversation with Plaintiff's mother, but did not hear what was discussed. After this conversation, Mr. Overton placed the pin previously discussed.

Mr. Johnson admitted that the plot map reflects that he and his wife own approximately 100 acres, but that their tax bill shows that from 1975 through 1992, they have paid taxes on 93 acres. The specific acreage upon which Defendants have been paying taxes was not identified.

The boundary dispute first arose when Defendants had problems with hunters and four-wheelers using the property, which precipitated discussions between Defendants and Plaintiff and lead to the realization that the parties were in disagreement about the boundary line. Mrs. Johnson testified that they started having problems about three years ago "when we just got run over with four-wheelers and hunters."

After trial, the Trial Court entered a Final Judgment on August 10, 2007 finding and holding, *inter alia*, that the allegations in the complaint were not sustained by the proof and that the boundary between Plaintiff's and Defendants' properties is established to be in accordance with the survey of Joseph R. Overton dated August 10, 1972. In its Memorandum Opinion incorporated into the Final Judgment by reference the Trial Court specifically found and held, *inter alia*:

> What we are dealing with essentially, if I can gather correctly, is about a three-acre tract of land. [Plaintiff] took title of that property in 1977.… In 1972 [Defendants] took title to their property.
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> Now, the deeds at issue here created an overlap, as Counsel [h]as referred to it, and I think some cases would refer to it as an interlock maybe. I believe they are the same thing. In essence both deeds describe the parties as being the title holders of this disputed area that is clearly shown on Exhibit 14, Mr. Cross' survey.
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> There is no dispute in this case but that the [Defendants'] deed is in accord with the survey which has been introduced as Exhibit 2…. In other words, everyone agrees that the Overton survey correctly establishes the boundary as called for in the 1972 deed to the [Defendants].
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> Now, when Mr. Overton surveyed this property in 1972 prior to [Defendants'] purchase, there is testimony that Mr. Overton had questions about where the southwestern line would be in consideration of other deeds on adjacent property. There is testimony that he went and discussed this with Mrs. Brooks, [Plaintiff's] mother. There is testimony that thereafter he placed the southwest corner at the point where it is on his survey and on the Cross survey. [Plaintiff] testified that when he purchased the property in 1977 that pen (sic) was there.
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> Now, thereafter [Plaintiff] says that he started using an area, which I guess is to the north of his house, for a garden. If I'm reading these directions correctly, I believe it's to the north of his house, in that area close to a line of trees that was planted by [Defendants] in 1982.

He further testified that to the west of that garden area there was a woodland in 1977 and that he set about to clear out a part of that woodland and that he hauled the brush down into the woods and burned the fire wood taken from it.

* * *

Now, encompassed within that sort of triangle there, this overlap, is part of the garden and it appears that it would be a very small portion on the easterly end of the garden and widening out as you proceeded (sic) to the west.

[Plaintiff] testified that in some portion of that area that's in dispute he gardened and that he cut timber for firewood. He further testified as to the balance of that property, that there was some trails cut through it and that he used the tractor to haul brush down there presumably when he cut the wood back in 1977 or shortly thereafter, that he deposited the brush somewhere down in the woods, and that since that time people hunted in that area and people used their ATVs in that area. In fact his testimony was that anyone who wanted to hunt or ride an ATV in there could.

* * *

Now, we have two causes of actions (sic) pled here. The first is by [Plaintiff] to establish title to this overlap by adverse possession. A counter claim has been asserted by [Defendants] and it is very brief and to the point, and it simply says, Now (sic) assuming the role of counter claimants, [Defendants] pray that the Court establish and quiet title in and to the counter claimants (sic) property as shown by their survey and as shown of record in Map Book 64L, Page 83, Map Number 64, Parcel 48, and that the Court quiet title in and to said property and to establish the boundary line between [Plaintiff] and [Defendants] and that the counter claimants have such other and further relief as they may show themselves to be entitled to upon a hearing of this cause.

Now, [Defendants' attorney], just before I started the opinion, made the statement that at most [Plaintiff] would be entitled to a prescriptive easement over that garden area and possibly, I guess, the area that had been cut for use of fire wood. I think his words were to the garden area alone.

The significance of these causes of action is that [Defendants], counter complainants, have not sought an ejectment of [Plaintiff] as to this property. And in fact I think [Defendants' attorney] has implicitly at least recognized that [Plaintiff] may in fact even have some defenses to an ejectment as to certain sections of that overlap that he clearly has used over the years.

* * *

In looking at 282-109 (sic) both sides here have paid property taxes. Both sides have a document that purports to convey ownership to them. Any presumption that arises one way or the other appears to me in that regard equal in this case. [Defendants] held the property by superior title recorded in 1972. There could be some argument made, certainly the inference could be drawn, that Mrs. Brooks agreed in 1972 that the point established by the Overton survey was in fact their boundary line.

[Plaintiff] when he purchased the property in 1977 acknowledged that that pen (sic) was there, but never brought up any issue about ownership until [Defendants] started to erect a fence to keep people off the property.

* * *

From this record the Court can't infer that [Plaintiff] did anything with a large section of this overlap, other than occasionally go upon it.

The Court finds that as to the correct property line boundary between these two parties, the [Defendants'] line as established in Exhibit 14 and as reflected in Exhibit 2 is the correct boundary line between the parties. There are certain portions which have not been precisely identified in this overlap that have been put to use by [Plaintiff] over the years. The garden area, the lawn area that has been cleared by him, certainly his use and possession of that property was open and adverse. Anybody who looked could tell that he was cutting trees, he was tending the garden, things of that nature.

As to the rest of it, I don't believe he has established adverse possession over the balance of that overlap. At best he has established occasional use of it, use which apparently was not objected to by [Defendants]. I'm not sure [Defendants] even knew about it, and if [they] did, whether there would have been any objection made or not. Certainly there has never been any attempt by [Defendants] prior to the erection of the fence to exclude [Plaintiff's] use or occasional use of the property.

* * *

I guess the long and the short of this is that [Plaintiff] gets to - - although it's not an issue in this case, I think [Defendants' attorney] has made reference to it, that if there was an ejectment action, then [Plaintiff] would certainly have defenses to such an action as to these areas where he has clearly possessed the property over the years, but I don't have that before me because [Defendants] have not filed any such action; they have not sought to preclude him from using the garden nor have they sought to preclude him from using what [Plaintiff] refers to as the lawn area. So that is not an issue and may never ever be an issue between these parties.

> But the line, I think, is clearly established by the Cross and Overton surveys, the [Defendants'] line. So the Court finds against [Plaintiff] on the adverse possession and establishes the line as I have previously indicated.

Plaintiff filed a motion for new trial or to alter or amend the judgment, which the Trial Court denied. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises three issues on appeal: 1) whether the Trial Court erred in holding that Plaintiff did not prove adverse possession to the disputed area or overlap of around 3 acres so that Plaintiff would have the 8.7 acres called for in his deed; 2) whether the Trial Court erred in failing to vest title to the garden and lawn areas in Plaintiff; and, 3) whether the Trial Court erred in failing to appoint a special master to set a new boundary line.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

At trial, Plaintiff relied upon Tenn. Code Ann. §§ 28-2-105, 28-2-109, and 28-9-110, which provide:

> **28-2-105. Adverse possession – Assurance of title. –** Any person holding any real estate or land of any kind or any legal or equitable interest therein, and such person and those through whom such person claims having been in adverse possession of same for seven (7) years, where the real estate is held and claimed by such person or those through whom such person claims by a conveyance, devise, grant, a decree of a court of record, or other assurance of title purporting to convey an estate in fee, and such conveyance, devise, grant, or other assurance of title, has been recorded in the register's office of the county in which the land lies for a period of thirty (30) years or more or such decree entered on the minutes of such court for a period of thirty (30) years or more, is vested with an absolute and indefeasible title to such real estate or interest therein.
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> **28-2-109. Presumption of ownership from payment of taxes. –** Any person holding any real estate or land of any kind, or any legal or equitable interest therein, who has paid, or who and those through whom such person claims have paid, the state and county taxes on the same for more then twenty (20) years continuously prior to the date when any question arises in any of the courts of this state concerning the

> same, and who has had or who and those through whom such person claims have had, such person's deed, conveyance, grant or other assurance of title recorded in the register's office of the county in which the land lies, for such period of more than twenty (20) years, shall be presumed prima facie to be the legal owner of such land.
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> **28-2-110. Action barred by nonpayment of taxes.** – (a) Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in any of the courts of this state.…

Tenn. Code Ann. §§ 28-2-105, 28-2-109, 28-2-110 (2000).

As is all too often the situation with many real property cases that come before this Court, evidence, which may have appeared clear to the lawyers and the Trial Court who observed the witnesses testifying, gesturing, and pointing things out, appears less than clear without the benefit of the gestures. While it is not clear to this Court from the record how much land is in dispute, the Trial Court did find that the disputed overlap "is about a three-acre tract of land." The evidence does not preponderate against this finding. The record shows that the description in Defendants' deed encompasses the area in dispute and that Defendants' deed was recorded in 1972, approximately five years before Plaintiff was deeded his property. Plaintiff attempted to claim title to the disputed land by way of two different theories.

First, Plaintiff asserted that he had color of title[1] through his recorded deed and that he had adversely possessed the property for more than the seven years required under Tenn. Code Ann. § 28-2-105. As pertinent to this issue, our Supreme Court has instructed:

> In order to establish adverse possession under [the common law] theory, or in any statutorily based claim, the possession must have been exclusive, actual, adverse, continuous, open, and notorious for the requisite period of time. *Hightower v. Pendergrass*, 662 S.W.2d 932, 935 n.2 (Tenn. 1983); *cf. Menefee v. Davidson County*, 195 Tenn. 547, 260 S.W.2d 283, 285 (Tenn. 1953). Adverse possession is, of course, a question of fact. *Wilson v. Price*, 195 S.W.3d 661, 666 (Tenn. Ct. App. 2005). The burden of proof is on the individual claiming ownership by adverse possession and the quality of the evidence must be clear and convincing. *O'Brien v. Waggoner*, 20 Tenn. App. 145, 96 S.W.2d 170, 176 (Tenn. Ct. App. 1936). The

[1] Color of title has been described by our Supreme Court as "something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used." *Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366, 376 n.3 (Tenn. 2007) (quoting 10 *Thompson on Real Property* § 87.12, at 145).

> actual owner must either have knowledge of the adverse possession, or the possession must be so open and notorious to imply a presumption of that fact. *Kirkman v. Brown*, 93 Tenn. 476, 27 S.W. 709, 710 (Tenn. 1894). When an adverse possessor holds the land for a period of twenty years, even absent any assurance or color of title, the title vests in that possessor. *Cooke v. Smith*, 721 S.W.2d 251, 255-56 (Tenn. Ct. App. 1986).
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> A doctrine related to adverse possession is that of prescriptive easement…. Generally, this easement arises when a use, as distinguished from possession, is adverse rather than permissive, open and notorious, continuous and without interruption, and for the requisite period of prescription. Boyer, *Survey of the Law of Property* 569-70. The extent of the rights matured by prescription is based upon the extent of the use during the period of prescription. *Id*.
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> Most authorities describe the doctrine of adverse possession and that of prescriptive easement as "blended" but with differing histories; the primary distinction is that the adverse possessor *occupied* the land of another, whereas, in prescription, there is merely adverse *use* of the land of another. *See* William B. Stoebuck, *The Fiction of Presumed Grant*, 15 Kan. L. Rev. 17 (1966); Roger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, *The Law of Property* § 8.7, at 451 (1984). A prescriptive easement is not ownership and the right acquired is limited to the specific use. *Bradley v. McLeod*, 984 S.W.2d 929, 934 (Tenn. Ct. App. 1998).
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> In order to establish prescriptive easement under the common law of this state, the usage much be adverse, under claim of right, continuous, uninterrupted, open, visible, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. *Id*. at 935; *see Pevear v. Hunt*, 924 S.W.2d 114, 116 (Tenn. Ct. App. 1996); *House v. Close*, 48 Tenn. App. 341, 346 S.W.2d 445, 447 (Tenn. Ct. App. 1961). The requisite period of time of continuous use and enjoyment for a prescriptive easement is twenty years. *Bradley*, 984 S.W.2d at 935; *Pevear*, 924 S.W.2d at 116; *Town of Benton v. Peoples Bank of Polk County*, 904 S.W.2d 598, 602 (Tenn. Ct. App. 1995).

Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 377-79 (Tenn. 2007) (emphasis in original).

The Trial Court found that Plaintiff had not proven adverse possession of the disputed area by clear and convincing evidence. The evidence in the record on appeal does not preponderate against this finding. Plaintiff argues on appeal that the Trial Court found that at least he had adversely possessed the area of the garden and lawn. Plaintiff is mistaken. Reading the Trial Court's Memorandum Opinion in its entirety shows that what the Trial Court actually found was that

Plaintiff had shown that his use and possession of the garden and lawn areas were open and adverse which led to the Trial Court's discussion about prescriptive easement and the Defendants not pursuing an ejectment action against Plaintiff. However, the Trial Court did not find that Plaintiff had proven all the necessary elements of adverse possession by clear and convincing evidence. The evidence does not preponderate against these findings and the Trial Court's resulting decision. We affirm the Trial Court's judgment that Plaintiff failed to establish adverse possession as to any of the disputed area.

Plaintiff's second theory claimed ownership to the disputed property by virtue of Tenn. Code Ann. §§ 28-2-109 and 28-2-110. The Trial Court found that Plaintiff and Defendants each had a document that purported to convey ownership of the disputed area and both sides had paid property taxes on their property, and, therefore, any presumption that would arise would be "in that regard equal in this case." The evidence does not preponderate against these findings.

Plaintiff argues, in part, that because Defendants were only paying taxes on approximately 93 acres, rather than the approximately 100 acres called for in their deed, Defendants failed to pay taxes on the dispute land. However, the record is devoid of evidence showing specifically which 93 acres Defendants actually were paying taxes on. It would be pure speculation to assume that because Defendants' tax bills were for 93 acres, the particular section of land in dispute in this case was the land omitted from Defendants' tax bills. The only evidence in the record on this issue shows, as found by the Trial Court, that both Plaintiff and Defendants paid their property taxes. We, therefore, cannot find that the Trial Court erred in its conclusion that any presumption that arose would be "in that regard equal in this case." We affirm the Trial Court's holding as to this issue.

Our resolution of Plaintiff's first two issues pretermits the necessity of considering the third issue raised by Plaintiff.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, William C. Brooks, and his surety.

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D. MICHAEL SWINEY, JUDGE